

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17357 of 2016

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Satyendra Kumar And Co. Pvt. Ltd., a Company registered under the Companies Act, 1956, having its Registered office at G-7, Tara Tower, Behind Republic Hotel, Exhibition Road, Patna through its Director Rajneesh Kumar son of Sri Mahesh Kumar, Resident of 201 Raj Villa, Bajranj Colony, Tej Pratap East, New By Pass Road, Patna- 800002.

.... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary Rural Works Department, Patna, Bihar.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Rural Works Division, Government of Bihar, Patna, Bihar.
4. The Executive Engineer, Rural Works Division, Work Division, Sheikhpura.

.... Respondent/s

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Appearance :

For the Petitioner/s : M/s Mrigank Mauli and Prince Kr. Mishra, Advs.
For the Respondent/s : Mr. Ajay- GA 5
Mr. Ashish Kumar Lal, AC to GA 5

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 12-04-2017

In the present case, the petitioner is challenging the order dated 02.06.2016, contained in Memo No. 6777 (Annexure-10), passed by the Engineer-in-Chief, Rural Works Department, Government of Bihar, Patna, thereby the petitioner has been declared defaulter and subsequently, he has been debarred from participating in the future tender. The petitioner has further challenged Memo no. 2131 dated 13.03.2009 (Annexure-13) passed by the Principal Secretary, Road Construction Department, Government of Bihar, stipulating guideline to declare the defaulter, debar him, on



completion of work, restoration to the original position.

The petitioner is a limited Company incorporated under the Companies Act, 1956.

The respondent has issued notice, invited the tender under the Mukhyamantri Gram Sampark Yojana (herein after referred to as “Gram Sampark Yojana”) for construction of following roads:-

- (i) Sheikhpura Gagaur Road to Gagaur Bind Toli,
- (ii) Sheikhpura Ghatkusumbha Road to Akarpur Road
- (iii) Barbiga Sarmera Road NH-82 to Mushapur
- (iv) Mafo More to Aijhi Mahto Tola Via Dhelwa Gosai and
- (v) Teus Maidan to Subhanpur.

As the petitioner was declared L-1, he was given the work order for construction of the road and other incidental work, which was to be done during the period from 10.03.2015 to 09.03.2016.

As per the claim of the petitioner, he has completed the soil work, constructed culvert and other incidental work, but he was feeling difficulty in metalling the road, as for metalling the road, the stone chips are the main ingredients, in absence of the same, the road could not be constructed. The petitioner was assigned to lift the stone chips from Sheikhpura Mines, but in Sheikhpura Mines, there was no breaking of stones and the stone chips were not available for the purposes of completion of the work.



First, the petitioner has addressed a letter (Annexure-3) to the Executive Engineer, Rural Works Department wherein he has informed that as per the D.P.R., he has to carry the load of stone chips from Sheikhpura Mines, but there, work of milling of stone has not been started till date. He has addressed another letter to the Executive Engineer, Rural Works Department on 08.09.2015, whereby he has informed that he has already completed the work of soil and has constructed the culvert, but on account of non-availability of the stone chips, he has failed to start the work of construction of the road. On the same day, i.e. 8.9.2015, he has again written a letter to the Executive Engineer wherein he has mentioned that six months has already been crossed, but the work of breaking stones at Sheikhpura has not started, which has created a serious adverse impact upon the petitioner in construction and completion of work. Thereafter, the petitioner has written a letter dated 21.09.2015 (Annexure-6), reiterating the same thing that he has already constructed the culvert as well as he has already completed the work of soil, but in absence of the stone material, he is unable to start the work of construction of road.

It appears that the Additional Chief Executive Officer-cum-Secretary, BRRDA has addressed a letter to the petitioner where it has been mentioned that procurement of the material is the duty and



responsibility of the Contractor himself, and Contractor has to ensure the construction of the road is completed within the period mentioned in the agreement. If the work is not carried, he must hold responsible to himself and refused to come out in any manner with helping hand in procuring the stone chips.

Thereafter, the petitioner has addressed a letter dated 27.11.2015 (Annexure-7) to the Executive Engineer, Rural Works Department where he has mentioned that he has already completed the work of soil and has constructed the culvert in all the five roads, but due to non-availability of the stone chips, he is not in a position to initiate the work and his all staff are sitting idle, causing great loss to the Company whereafter he has received a letter dated 30.01.2016 from the Executive Engineer where it has been mentioned that the mining and milling of the stones has already started and he can procure the stone chips for construction of the aforesaid road.

Thereafter, the petitioner has written a letter dated 17.02.2016 (Annexure-9) to the Executive Engineer wherein he has mentioned that the agreement has been executed on 10.03.2015 wherein it has been mentioned, the due date of completion of the work is dated 09.03.2016. As the stone chips were not available, which was informed by him from time to time, he has made a request that the time may be extended so that he could be able to complete



the work, but without considering the request and without taking into consideration of the circumstances, which was beyond the control of petitioner, the Engineer-in-Chief, passed the order dated 02.06.2016, wherein it has been mentioned that in terms of the agreement, the petitioner was required to complete the work within the time assigned therein and as he has failed to carry out the work, he was declared defaulter and he was prevented to participate in the future tender.

The counsel for the petitioner submits that the petitioner could not complete the work on account of non-availability of the stone chips. As per the agreement, the petitioner was assigned to lift the stone chips from Sheikhpura Mines, but Sheikhpura Mines was not generating the stone chips. Repeatedly the petitioner asked the respondent to make an alternative arrangement for the supply of stone chips, but they have not cared to look fervent request for making arrangement so that the petitioner could complete the work within the period mentioned in the agreement, inasmuch as when the stone chips were made available, he requested the authority to extend the period for completion of the work, but the authority ignoring the request and without looking to the adverse circumstances, passed the impugned order, thereby the petitioner has been declared defaulter and debarred from participating in the future tender.

The counsel for the petitioner submits that even before



passing the order of this debarment, neither notice was given nor the show cause was issued and straightway the order has been passed, which completely violates the principle of natural justice, inasmuch as the action of the Department is completely arbitrary, they have failed to see the attending circumstances when the petitioner was repeatedly asking to make availability of stone chips, but they failed to provide the same. Under the agreement, the stone chips was to be lifted from Sheikhpura Mines and Sheikhpura Mines was not working, in such circumstances, the petitioner cannot be held responsible in case of bona fide dispute with fixation of responsibility for non-completion of work, in such circumstances, the responsibility can be fixed only by the independent Arbitrator not for the authority, who himself cannot fix the responsibility upon the petitioner, the impugned order declaring the petitioner as defaulter is not sustainable.

The counsel for the petitioner has placed reliance on the judgments reported in 2013 (1) PLJR 952 (M/s NCC Ltd. vs. The State of Bihar), 2015, 7 SCC 728 (Joshi Technologies International Inc. vs. Union of India and others) and 2014 (9) SCC 105 (Gorkha Security Services vs. Government [NCT of Delhi] and others), has also submitted that if the action is arbitrary, the Court should interfere and grant the justice to the party, however the counsel for the State



has vehemently opposed the submission of the petitioner and submitted that the petitioner has entered into the agreement with open eyes, he was knowing the attending facts and circumstances and availability of stones, now he cannot blame the State for non-availability of the stone chips, it was his responsibility to procure the stone and construct the road in view of Clause 7.1 of the SBD within the time stipulated in the agreement.

Having considered the rival contentions of the parties, in the present case admittedly the agreement has been entered into between the petitioner and the State. As per the terms of agreement, the petitioner was assigned to lift stone chips from Sheikhpura Mines, but Sheikhpura Mines was found closed, was not generating any stone chips. As there was no work of milling of stones at Sheikhpura District, the petitioner has repeatedly informed the authority concerned for providing the alternative source, but they have not responded. After a long lapse of time, the Executive Engineer has informed that Sheikhpura Mines has started generating the stone chips, but by that time, the substantial period was over, non-availability of the stone chips was beyond the control of the petitioner, it cannot be said, in normal circumstances, the petitioner has failed to discharge the duty and carry out the work, the non-availability of stone was within the knowledge of the respondent



authority now they cannot blame the petitioner for non-completion of the work within the time prescribed in agreement, they failed to take into consideration the extreme circumstance, which was beyond the control of the petitioner, in such circumstances, petitioner cannot be asked to perform the impossible work when the petitioner has repeatedly informed that he has completed the soil work and has constructed the culvert, having not started the work of metalling the road on account of non-availability of the stone chips, they should have been taken a pragmatic view and should have extended the period, instead without giving any notice or show cause, the order has been passed, reliance can be placed on the aforesaid judgments.

The Hon'ble Supreme Court says that normally the writ is not maintainable in the contract matter if the action is *per se* illegal and it does not satisfy the parameter of Article 14 of the Constitution of India, in such circumstance, the Writ Court, in exercise of power of judicial review, can interfere with the matter and that too in a situation, where the order has been passed without giving any opportunity of hearing and without giving any chance to give reply to the party.

In such view of the matter, the action of the State is not sustainable. The order dated 02.06.2016 contained in Memo no. 6777 (Annexure-10), is hereby quashed. The petitioner could not be treated



to have been put in the list of debarred contractor and will have liberty to participate in the future tender.

Accordingly, this petition is allowed to the aforesaid extent.

(Shivaji Pandey, J)

Mahesh/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	19.04.2017
Transmission Date	N/A

